85-905

Supreme Court, U.S.
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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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DONALD E. SALISBURY, PETITIONER

VS.

JAMES RIVER CORPORATION, AND
UNITED PAPER WORKERS INTERNATIONAL, AFL/CIO, AND
LOCAL 1010 UNITED PAPERWORKERS, RESPONDENTS

* * * * * * * * *

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

* * * * * * * * *

BRIEF OF RESPONDENT JAMES RIVER CORPORATION IN RESPONSE TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE ISSUE OF THE RETROACTIVE APPLICATION OF THE SIX-MONTH STATUTE OF LIMITATIONS OF §10(b) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, 29 U.S.C. §160(b) IS RAISED IN THE FACTS OF THIS CASE.

II. EVEN IF THE ISSUE OF RETROACTIVE APPLICATION OF THE SIX-MONTH STATUTE OF LIMITATIONS IS RAISED IN THE FACTS OF THIS CASE, SHOULD THE STATUTE BE APPLIED RETROACTIVELY.

STATEMENT

I. Prior to Petitioner's discharge from employment the United States Court of Appeals for the Sixth Circuit decided Badon v General Motors Corp., 679 F. 2d 93 (6th Cir. 1982), holding that since the State of Michigan had not adopted an arbitration statute which applied to collective bargaining agreements, the Court would apply the limitations period of §10(b) of the National Labor Relations Act to all unfair representation actions arising in Michigan. In its decision the Sixth Circuit Court of Appeals concluded that the most appropriate statute of limitations for an unfair representation act, pursuant to the United States Supreme Court's decision in United Parcel Service, Inc. v Mitchell, 451 U.S 56 (1981) would be that of the state statute of limitations for the vacation of arbitration awards. Since Michigan had not adopted such a statute which would apply to labor contracts, however, the Sixth Circuit held that §10(b) provided the appropriate limitations period for actions arising in Michigan. The specific holding of the Supreme Court in Mitchell, of course, was superceded by the Court's decision in DelCostello v Teamsters, 462 U.S. 1512 (1983).

II. On or about February 4, 1983, Northwest Industrial Credit Union filed a Complaint against Petitioner in the District Court, 8th Judicial District of the State of Michigan. Thereafter the matter was removed to the State Circuit Court for the County of Kalamazoo, State of Michigan. On or about June 1, 1983, Petitioner initiated the present action in the Michigan Circuit Court, thereby alleging for the first time a cause of action against James River Corporation (James River) and United Paperworkers International Union (UPIU) and UPIU Local No. 1010 ("Unions"). James River and the Unions were impleaded by the Petitioner on the theory that they were liable to the Petitioner for causing his inability to pay his debt. In the Third-Party

Complaint Petitioner sets forth a claim for "wrongful discharge" (Count I), "intentional infliction of emotional distress" (Count II), and "retaliatory discharge" (Count III) as against James River Corporation, and "unfair representation" (Count IV) as against the Unions. The matter was removed to the United States District Court for the Western District of Michigan, Southern Division. James River answered and filed its Motion to Dismiss or for Summary Judgment as to Counts I, II, and III of the Third Party Complaint. The District Court granted James River's Motion pursuant to an Order dated April 23, 1984.[1]

The Union is the exclusive bargaining representative for the production and maintenance employees at James River's paperboard packaging manufacturing facility in Kalamazoo, Michigan. As exclusive bargaining representative, the Union has entered into a Collective Bargaining Agreement (the "Agreement") with James River. This Agreement provides for a four-step grievance and arbitration procedure for the resolution of all disputes arising under the terms of the Agreement. Until on or about August 13, 1982, the Petitioner was employed by James River and was subject to the terms of the Agreement. On that date, he was suspended by James River and subsequently discharged, on the grounds of deliberate destruction of Company property. The Petitioner initiated the grievance procedure of the Agreement, and at the fourth step of the grievance procedure the Union's Bargaining Committee decided not to pursue

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[1]Respondent James River respectfully disagrees with the conclusion reached by the Sixth Circuit Court of Appeals that the District Court Judge intended to remand Counts II and III to the state court for further proceedings. The District Court's Order states that the "case is before the Court pursuant to a Motion to Dismiss filed by the Third Party Defendant. For the reasons expressed in this Court's Opinion dated January 12, 1984, the Motion to Dismiss is granted"; Third Party Defendant James River's Motion granted by the District Court Order prays "that an Order be entered . . . dismissing the Third Party Complaint against Defendant James River . . ."

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Petitioner appealed the Bargaining Committee's decision to the membership of the local union, but after a full discussion of the merits of the grievance Local membership made a final decision, by a vote of 30 to 19, not to take Petitioner's grievance to arbitration. The Petitioner was present when the final membership vote was tallied and announced on that date. The Petitioner commenced his action against the Unions and James River more than seven months after the final resolution of this dispute.

REASONS FOR DENYING THE PETITION

Respondent does not agree with Petitioner's assertion that an appropriate question is presented in this matter as to whether the decision by the Supreme Court in DelCostello v. Teamsters, 462 U.S. 1512 (1983), should be applied retroactively, since the District Court below did not rely on that case for its decision, but rather relied on Badon v. General Motors Corp., 679 F. 2d 93 (6th Cir. 1982). In Badon, which was decided before Petitioner was even discharged by James River, the Court held that since the State of Michigan

had not adopted an arbitration statute which applied to collective bargaining agreements, the Court would apply the limitations period of §10(b) of the National Labor Relations Act to all unfair representation actions arising in Michigan.[2] Since Petitioner's action did not accrue until several months after the Badon decision, the District Court was not required to rely on the DelCostello decision or address the retroactivity issue.

To the extent that the retroactivity of DelCostello is an appropriate issue herein, Respondent contends that that decision should be given retroactive effect. In Smith v General Motors Corp., 747 F.2d 372 (6th Cir. 1984) (en banc) the Sixth Circuit Court of Appeals followed the majority of the Courts ot Appeals which have considered the question and expressly held that DelCostello should be applied

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[2]In Badon, the Court held that the most appropriate statute of limitations for an unfair representation action, pursuant to the Supreme Court's decision in United Parcel Service, Inc v. Mitchell, 451 U.S. 56 (1981), would be that of the state statute of limitations for the vacation of arbitration awards. Since Michigan had not adopted such a

statute which would apply to labor contracts, however, the Sixth Circuit held that §10(b) provided the appropriate limitations period for actions arising in Michigan. The specific holding by the Supreme Court in Mitchell, of course, was superseded by the DelCostello decision.

retroactively. See Perez v. Dana Corp., 718 F. 2d 581 (3d Cir. 1983); Edwards v. Sea-Land Service, Inc., 720 F. 2d 857 (5th Cir. 1983); Rogers v. Lockheed-Georgia Co., 720 F. 2d 1247 (11th Cir. 1983).

Only one Court of Appeals has declined to apply DelCostello retroactively. See Edwards v. Teamsters Local No. 36, 719 F. 2d 1036 (9th Cir. 1983), cert. denied, 104 S. Ct. 1599 (1984). The Court based that decision upon earlier 9th Circuit case law which established a three-year limitations period for actions against unions for breach of the duty of fair representation. Since, as discussed supra, the case law established in the Sixth Circuit at the time the Salisbury cause of action accrued applied the §10(b) limitations period, Respondent submits that the reasoning of Edwards is not applicable herein.

It is also clear that Salisbury in the instant matter cannot meet the criteria established by the Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), for denying retroactive application to its decisions. On April 20, 1981,

long before Petitioner had even been discharged by the Company, the Supreme Court decided in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981), that the relatively short state statutes of limitations for the vacation of arbitration awards should be applied to actions of this nature. The concurring opinion by Justice Stewart in that case clearly foreshadowed that the longer limitations period of §10(b) might also be applied.

In addition, as discussed supra, the Sixth Circuit decided in Badon, prior to Petitioner's discharge by the Company, that the §10(b) limitations period would apply to unfair representation actions arising in Michigan. Accordingly, it cannot be said that Petitioner could reasonably have relied on pre-DelCostello case law establishing a longer statute of limitations, as required by Huson, to counter the general rule that Supreme Court decisions are to be applied retroactively. Accordingly, any prejudice which inures to Petitioner by the application of the §10(b) limitations period is not caused by the retroactive

application of the DelCostello decision, but rather by his own delay.

CONCLUSION

For the foregoing reasons Respondent James River Corporation respectfully requests that the Petition for Writ of Certiorari be denied.

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